Editor's note: Appealed -- aff'd, Civ.No. 85-313 (D. Wyo. Oct. 1, 1987); dismissed by stipulation after cert denied in FMC (10th Cir. March 31, 1984).

ARK LAND CO.

IBLA 83-975 Decided April 25, 1985

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, dismissing in part and sustaining in part objections to readjustment of coal leases W-054727, W-054728, and W-054737.

Affirmed in part, set aside in part, and remanded.

1. Coal Leases and Permits: Leases--Coal Leases and Permits: Readjustment

> BLM is not barred from readjusting the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is transmitted prior to the end of the 20-year period that follows lease issuance.

2. Coal Leases and Permits: Leases--Coal Leases and Permits: Readjustment

> When the Department of the Interior readjusts a lease that was issued prior to the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201 (1982), it must do so in conformity with the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982).

3. Coal Leases and Permits: Leases--Coal Leases and Permits: Readjustment

> A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the land.

APPEARANCES: Brent L. Motchan, Esq., St. Louis, Missouri, Brian E. McGee, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Ark Land Company (Ark) appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated August 12, 1983, dismissing in part and sustaining in part Ark's objections to the readjustment of coal leases W-054727, W-054728, and W-054737. Each of the three leases at issue recites an agreement between appellant's predecessor in interest, Ruby Company, and the United States entered into on November 1, 1961. 1/ Ark's appeal calls into question the Secretary's authority to readjust the instant leases and to apply the provisions of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 201 (1982), thereto.

The case files reveal that BLM first indicated its intention to readjust the leases by a notice dated October 27, 1981, and received by appellant on October 30, 1981. This notice stated that the leases had been issued effective November 1, 1961, and that their terms and conditions would become subject to readjustment on November 1, 1981. Regulation 43 CFR 3451 (1981) was cited by BLM as authority for its actions. That regulation provides, inter alia, that all leases issued prior to August 4, 1976, shall be subject to readjustment at the end of the current 20-year period and at the end of each 10-year period thereafter.

Not cited by BLM, but clearly relevant here, are section 3(d) of each lease and section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207. Section 3(d) provides:

> The lessor reserves the following rights:
>
> * * * * * * *
>
> (d) Readjustment of terms. -- The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

At the time the lease was issued, section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1958), provided:

> Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.

Thereafter in 1976, section 7 of the Mineral Leasing Act of 1920 was amended by section 6 of FCLAA, 30 U.S.C. § 207(a) (1982), to read in pertinent part

1/ In each case, the signature by the Chief, Minerals Section, on behalf of the United States is dated Nov. 6, 1961.

as follows: "Such rentals and royalties and other terms and conditions of the leases will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended."

Ark contends that the Secretary's readjustment of its leases is barred by statute and by the contractual provisions of the leases because BLM failed to notify Ark of the proposed readjusted lease terms and/or failed to render a decision with respect to final readjustment terms and conditions by the end of the initial 20-year period. In support thereof, Ark correctly points out that BLM first provided Ark with a copy of the readjusted lease terms by notice dated June 11, 1982. The "decision" to which Ark refers is the decision denying its protest, dated August 12, 1983.

[1] Though factually correct, Ark's argument is legally flawed. In Coastal States Energy Co., 70 IBLA 386 (1983), 2/ this Board held that BLM's right to readjust is preserved if a lessee is notified of BLM's intention to readjust on or prior to the anniversary date of the lease. In support of this holding, we cited Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949 (10th Cir. 1982). In Rosebud the court of Appeals held that a coal lease readjustment had to be made when each 20-year period expired and not later. In that case BLM had attempted to readjust a coal lease some 2-1/2 years after expiration of the 20-year period. The court stated, quoting from the district court's decision, "The government could easily have notified Rosebud on April 5, 1975 (the date of expiration of the 20-year period) at least that it intended to readjust the terms of the lease." Id. at 953. Thus, the court contemplated that notice of intent to readjust given prior to expiration of the 20-year period would be sufficient.

Following notification to Ark of its intention to readjust, BLM provided Ark with the actual proposed lease terms within 7-1/2 months. This action by BLM was taken pursuant to regulation 43 CFR 3451.1(c)(2) (1981), requiring that a lease be readjusted within 2 years after notice. We discern no violation of this regulation in BLM's conduct, nor is there any violation of lease or statute.

[2] Whether the provisions of FCLAA may be applied to leases issued prior to FCLAA's enactment, such as the leases at issue here, has been decided by this Board on numerous occasions. In Coastal States Energy Co., supra at 390, the Board stated:

Coastal further contends that FCLAA does not apply to coal leases issued prior to enactment (August 4, 1976) of that Act. That exact question was addressed by the Solicitor in Solicitor's Opinion M-36939, 88 I.D. 1003 (1981). Therein, the Solicitor concluded that "when the Secretary readjusts a pre-FCLAA lease he must do so in conformity with the Act [the Mineral Leasing Act] as amended." Id. at 1004. That conclusion has been applied by the Board in Lone Star Steel Co., [65 IBLA 147 (1982)].

2/ Appeal pending, Coastal States Energy Co. v. Watt, No. C 83-0730J (D. Utah filed June 3, 1983).

We reiterate our earlier conclusion. The provisions of FCLAA not only may be applied to appellant's leases, they must be applied if appellant desires the leases to continue.

[3] Ark's remaining arguments focus upon individual lease terms and repeatedly pose the question whether the purported readjustment breaches Ark's contractual rights, is factually unsupported, and/or is arbitrary, capricious, or an abuse of discretion. With respect to its argument based on contract rights, this Board held in Mid-Continent Coal & Coke Co., 83 IBLA 56, 65 (1984), that the lessee of a pre-FCLAA lease simply has no vested rights to the indefinite continuation of existing lease terms, since all the terms and conditions were prescribed subject to periodic readjustment. Moreover, the court of appeals in Rosebud noted that the scope or nature of the changes that BLM could impose was not limited only to specific statutory provisions, and, thus, there existed a very broad power to make changes considered to be in accordance with the proper administration of the lands. 667 F.2d at 951. Consistent with this holding, this Board has stated on several occasions that a decision by BLM to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands. Mid-Continent Coal & Coke Co., supra at 59, and cases cited therein.

Section 3 of Ark's readjusted lease addresses the diligence requirements imposed on a lessee. In response to Ark's protest that BLM improperly required production of coal in commercial quantities before June 1, 1986, BLM modified this provision in accordance with applicable regulations. On appeal, Ark now asserts that FCLAA is inapplicable to its pre-FCLAA lease, an argument disposed of above, and further contends that the diligence requirements of section 3 are satisfied by the commencement of production by the end of the applicable 10-year period, rather than the necessity of showing production in commercial quantities. In support thereof, Ark refers to two provisions of FCLAA, the first of which states: "Any lease which is not producing in commercial quantities at the end of ten years shall be terminated." 30 U.S.C. § 207(a) (1982). The second provision provides: "Nothing in this subsection shall be construed to affect the requirement contained in the second sentence of subsection (a) of this section [quoted in the previous sentence] relating to commencement of production at the end of ten years." 30 U.S.C. § 207(b) (1982) (emphasis supplied). Thus, Ark argues that the second quoted provision, modifies the first so that the mere commencement of production satisfies both provisions.

Contrary to ARk's contention, the commencement of production that 30 U.S.C. § 207(b) refers to is clearly production in commercial quantities. No citation to any provision of the legislative history is offered by Ark in support of a contrary conclusion. In Coastal States Energy Co., supra at 392, this Board found regulatory support for our conclusion:

> Coastal further contends that the Department cannot require "production in commercial quantities" at the end of the 10-year period. Coastal contends that all that is required is that "production be commenced within said period" * * *. In response we note that the regulations now define "commercial quantities" to

> mean "1 percent of the recoverable coal reserves or LMU recoverable coal reserves." 30 CFR 211.2(7); 47 FR 33180 (July 30, 1982). [Now 43 CFR 3480.0-5(a)(6) (1984)]. The regulations require such production. We are without authority to waive that legal obligation.

Ark's objection to BLM's establishment of bond amounts based on unpublished inhouse guidelines has been addressed by this Board in Cambridge Mining Co., 74 IBLA 26 (1983). Therein, we held that appellant had failed to demonstrate that such guidelines were arbitrary and capricious merely because their rationale did not appear in the guidelines themselves. 74 IBLA at 29.

Under the terms of Ark's readjusted lease, annual rental has been increased from $ 1 to $ 3 per acre, and no credit against production royalties is allowed by BLM for such rental payments. Appellant's objection to these provisions as unreasonable has been answered in Mid-Continent Coal & Coke Co., supra at 62-3:

> Section 5, concerning the rental term, is specifically mandated by 43 CFR 3473.3-1(a), which provides that "[t]he annual rental per acre or fraction thereof on any lease issued or readjusted after the promulgation of this subpart shall not be less than $ 3. The amount of the rental will be specified in the lease." Section 5 of the readjusted lease provides for a rental of $ 3 per acre or fraction thereof. BLM properly imposed the new rental to comport with the regulatory requirement.

BLM correctly stated in its decision that there is no longer authority for allowing rentals to be credited against royalties since the FCLAA deleted the applicable authorization from the former section 7 of the Mineral Leasing Act of 1920 (cf. 30 U.S.C. § 207(a) (1982) with 30 U.S.C. § 207 (1958, 1970). Thus, 43 CFR 3473.3-1(d) now provides: "Rentals due and payable for any lease year commencing on or after the effective date of the readjustment shall not be credited against royalties."

Also described by Ark as unreasonable is BLM's increase in the production royalties payable to the United States. Section 6 of Ark's readjusted lease states that the lessee shall pay a production royalty of 12-1/2 percent of the value of coal produced by strip or auger mining methods and 8 percent of the value of coal produced by underground mining methods. Under Ark's 1961 lease, it was required to pay royalty in the amount of 15 cents per ton on a quarterly basis. Ark states that coal will be produced from the leases by both strip and underground mining methods.

In response to similar arguments in Blackhawk Coal Co., 68 IBLA 96, 99 (1982), the Board held:

> Departmental regulation 43 CFR 3473.3-2 provides two ways of granting underground coal lessees relief from the statutory 12-1/2 percent royalty. Subsections (a)(1) and (a)(3) implement 30 U.S.C. § 207(a) (1976) and provide that a rate as low as

> 5 percent may be determined at lease issuance. Alternatively, the Department may establish a royalty rate in the lease and provide relief after lease issuance upon application of the lessee under subsection (d), which implements 30 U.S.C. § 209 (1976). Appellant has not persuaded us that it is unreasonable to establish an 8 percent royalty rate in the lease now, since the rate may temporarily be reduced later if conditions warrant. If a lower rate is put into the lease now and economic conditions change favorably during the term of the lease, there will be no opportunity for upward adjustment of the royalty figure until the lease is again ripe for readjustment. The method chosen by BLM thus assures the United States a fairer return over the life of [the] lease, provides appellant some relief from [the] statutory 12-1/2 percent rate, yet affords appellant an opportunity for further royalty relief when it is really needed. We previously have affirmed BLM decisions denying special royalty relief at lease readjustment, requiring lessees to seek such relief under 43 CFR 3473.3-2(d). Lone Star Steel Co., 65 IBLA 147 (1982); Garland Coal and Mining Co., 49 IBLA 400 (1980).

See also FMC Corp., 74 IBLA 389 (1983), and Coastal States Energy Co., supra at 393.

Consistent with Blackhawk, we affirm BLM's readjustment of appellant's production royalty. 3/ In so holding, we are not unmindful of the decision by the United States District Court for Wyoming styled FMC Wyoming Corp. v. Watt, C 83-347-K (June 29, 1984). Therein the court held that, with reference to surface mining operations, the Department could not apply the statutory mandated rate of 12-1/2 percent to all leases subject to readjustment, but rather the applicable royalty rate must be individually tailored to each lease. That case, involving a special bituminous coal mine wherein the cost of extracting coal increased over the life of the mine due to dipping coal seams, 4/ has been appealed by the Department to the court of appeals for the Tenth Circuit under docket number 84-2175 (Aug. 29, 1984).

Ark further objects to the provisions of section 6 of its readjusted lease requiring that production royalties be paid monthly rather than quarterly as before, and be based on the value of coal produced. If payments are to be calculated on a percentage basis, Ark reasons, any such payment

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3/ We also expressly reject appellant's rather ingenuous assertion that because BLM neglected to timely revise Rosebud's lease it is now estopped from revising Ark's lease. In essence, appellant's argument would result in the rule that having once failed to readjust a single lease, BLM was thereafter forestalled from readjusting anyone else's lease. Appellant fails to cite any authority for its basic contention that it has a right to rely on the terms of leases held by its competitors, nor is any apparent.

4/ Under this classification, the court pointed out, the mine is exempt from certain reclamation standards under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 (1982). As such, it is one of only two mines in the entire United States to be so classified, the court noted.

obligation should accrue only when the coal is sold rather than when the coal is mined.

As noted by the Tenth Circuit in Rosebud, supra, the scope or nature of the changes that BLM can impose upon readjustment is not limited and thus there exists a very broad power to make changes considered to be in accordance with the proper administration of the land. 667 F.2d at 951. We hold that BLM's readjustment of production royalty payments to require monthly payments based on the value of coal was well within the scope of permissible changes. Moreover, Ark's concern as to the valuation of unsold coal is answered by regulation at 30 CFR 211.63 (1981) (now 43 CFR 3485.2 (1984)).

Section 7 of Ark's readjusted lease addresses the issue of advance royalty. Appellant objects to this provision because it is said to violate Ark's contract rights and because its terms are ambiguous.

A similar objection was raised in Blackhawk Coal Co., supra at 99-100, and we believe our response there to be appropriate now:

> Appellant objects to section 7 which implements the Department's authority to "suspend the condition of continued operation upon the payment of advance royalties." 30 U.S.C. § 207(b) (1976). Previously, a definite figure for the advance royalty could be determined from the lease. Section 7, however, provides as follows:
>
> > Upon request by the lessee the Mining Supervisor may accept, for a total of not more than ten years, the payment of advance royalties in lieu of the condition of continued operation for any particular year. Any payment of advance royalties in lieu of continued operation shall be pursuant to an agreement, signed by the lessee and the Mining Supervisor, which shall be made a part of this lease. The agreement shall include a schedule of payments and shall be subject to the advance royalty conditions set forth in the regulations. The advance royalty shall be based on a percent of the value of a minimum number of tons which shall be determined on a schedule sufficient to exhaust the leased reserves in 40 years from the date of approval of the mining and reclamation plans or from June 1, 1976, depending on effective date of the lease. 5/
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> Appellant finds this exception unacceptable because it contemplates that the parties, without knowing the terms and conditions,

5/ Ark's section 7 differs slightly: the 40-year exhaustion period identified in the final sentence will commence June 1, 1976.

are agreeing to agree to something at a future date. The decision below fully responds to this objection as follows:

> Section 7 of all coal leases is inserted to comply with Section 7(b) of the MLLA. In its objections to this lease stipulation, the lessee appears to be overlooking two points. First, the lessee, not the Mining Supervisor, requests that advance royalties be paid. The lessee may not wish to pay advance royalties in lieu of continued operation and thus may not ever need to exercise the provisions of Section 7. Second, Section 7 generally outlines the terms of any advance royalty agreement. The agreement "shall include a schedule of payments" and "shall be based on a percent of the value of a minimum number of tons which shall be determined on a schedule sufficient to exhaust the leased reserves in 40 years . . ." If the regulations about advance royalties (43 CFR 3473.3-2(b)) change, then those regulations would apply to the leases under their current language.

We see no reason to reverse BLM's decision with respect to section 7.

Ark's objection to section 11 of the readjusted leases consists of a single sentence: "Section 11: Logical Mining Units. Ark objects to the BLM's assertion that the subsequent promulgation of a general regulatory provision can be deemed, without the concurrence of the parties, to supersede an express contractual provision."

As we noted above, Ark's reliance on the "express contractual provision" of its 1961 lease is misplaced. The lessee of a pre-FCLAA lease has no vested rights to the indefinite continuation of existing lease terms, since all the terms and conditions were prescribed subject to periodic readjustment. Mid-Continent Coal & Coke Co., supra at 65. Indeed, appellant has no vested right to the indefinite continuation of the lease period.

Ark objects to the provisions of sections 9 and 10 of its readjusted lease because these sections fail to recognize that mining and reclamation plans have already been approved for the leases at issue. These sections require a lessee to submit an exploration plan (section 9) and a mining plan (section 10) before certain activities may take place on the leases.

BLM's response to appellant's protest is dispositive of this issue and is affirmed:

> Section 9. Exploration Plan and Section 10. Mining Plan -- While these leases may be included in an approved mine plan, unforeseen circumstances may require future exploration to obtain additional data on the coal deposits. There is also the remote possibility that operations could terminate along with the mining plan.

Should the lessee then wish to resume operations on the leases, new mining plans would be required. Absent a requirement for such plans, the lessee might argue that it was not required to submit mining plans under its leases. In addition mining plans approved relate to coal beds that are currently under production. For other minable coal beds on these leases new or revised mining plans will be required. It is also necessary to revise mine plans as rock conditions may require mining changes. In addition, if the lessee has submitted exploration and mining plans which have been approved and no further changes would occur, then including Sections 9 and 10 in these leases should be harmless. Blackhawk Coal Co., 68 IBLA 96 (1982). Objection dismissed.

See also Coastal States Energy Co., 81 IBLA 171 (1984) at 175-76.

Section 13 of Ark's readjusted lease requires the lessee to bear the costs of any survey of leased lands to provide an inventory of the historical, cultural, archaeological, and paleontological values therein. The section further requires that the cost of any measures to protect such values discovered as a result of the survey is to be borne by the lessee.

Ark's objection to the financial burden placed on the lessee to protect such values cites no statute, regulation, stipulation, or prior lease provision and fails to demonstrate error in BLM's action. Moreover, in Gulf Oil Corp., 73 IBLA 328, 333 (1983), this provision was found to be proper where, as here, it was not inconsistent with lease stipulations.

Appellant's objections to section 14 of the readjusted lease are based in contract. This section reserves to the lessor the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee. In its statement of reasons, Ark compares the provisions of section 14 with parallel provisions of its prior lease and finds section 14 to be violative of its contractual rights and unduly broad.

Ark's argument is answered by Mid-Continent Coal & Coke Co., supra at 65, and at the risk of belaboring this issue, we set forth the following discussion:

As far as contractual rights are concerned, the lessee of a pre-FCLAA lease has no vested rights to the indefinite continuation of existing lease terms, since all the terms and conditions were prescribed subject to periodic readjustment. FMC Corp., supra at 393. Solicitor's Opinion, M-36939, 88 I.D. 1003, 1008 (1981). However, appellant does have certain rights in relation to other users of the lands covered by its lease. We find that appellant's objection to section 15 of the readjusted terms [is] unpersuasive, since any secondary uses authorized pursuant thereto would be subject to the lessee's paramount rights. Gulf Oil Corp., supra at 334; Blackhawk Coal Co., supra. [Emphasis in original.]

Sections 17 and 18 of the readjusted leases are the focus of Ark's next objection. These sections, which discuss employment practices, monopoly, and

fair practices, are similar to the provisions of 30 U.S.C. § 187 and 189 (1982), and expressly refer to these statutes. Ark objects to sections 17 and 18 because each fails to recite the requirement that 30 U.S.C. § 187 will yield to state law on the subjects discussed therein.

The concluding sentence of 30 U.S.C. § 187 (1982) states: "None of such provisions shall be in conflict with the laws of the State in which the leased property is situated." Ark is correct that neither section 17 nor 18 contains this language. This discrepancy, however, is not fatal. In Coastal States Energy Co., 81 IBLA 171, 177 (1984), we held that to include the above quoted language in the lease is unnecessary where the readjusted lease is subject to the statute. See also Lone Star Steel Co., supra at 152.

Section 3(d) of Ark's 1961 lease, supra, reserves to the lessor the right to readjust lease terms and conditions at the end of 20 years and thereafter, at the end of each succeeding 20-year period. Section 23 of Ark's readjusted lease states that the lease is subject to reasonable readjustment "at the end of this readjustment period on October 31, 1991, and subject to readjustment at the end of each ten year period thereafter." Ark objects to the language of section 23 because it contends that a 10-year readjustment period violates its contractual rights and is not authorized by FCLAA.

These theories have been previously discussed above, albeit in a different context. Suffice it to say that a lessee has no vested right to continue tenure under original lease conditions. On the contrary, it is the vested right of the United States as lessor and proprietor to readjust the terms. Gulf Oil Corp., supra at 330-31. Although lease readjustment is discretionary, if the Secretary readjusts a lease, he must impose certain lease terms and conditions on all pre-FCLAA leases at the time of their readjustment to conform to the provisions of FCLAA. One of these mandatory provisions, found at 30 U.S.C. § 207(a) (1982), sets forth the periods at which readjustment may be undertaken. Id. at 332.

Section 26 is the cause of appellant's final salvo on appeal. That sentence provides:

(a) The lessee shall be liable to the United States for any damage suffered by the United States in any way arising from or connected with the lessee's activities and operations under this lease, except where damage is caused by employees of the United States acting within the scope of their authority.

(b) The lessee shall indemnify and hold harmless the United States from any and all claims arising from or connected with the lessee's activities and operations under this lease.

(c) In any case where liability without fault is imposed on the lessee pursuant to this section, and the damages involved were caused by the action of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damages occurred. [Emphasis added.]

Appellant objects that subpart (c) extends its liability to the lessor beyond the legal and equitable remedies that any lessor would have under the existing state or Federal law to the establishment of a liability without fault standard. In response, BLM states that this lease provision has been a standard term in every lease issued since July 1977. Its inclusion can be construed as protecting the interests of the United States, BLM maintains, and is not intended to establish a condition of no fault for the United States Government. Moreover, BLM contends, lessee liability would be limited to equitable or legal remedies.

Our discussion of this identical issue in Coastal States Energy Co., 81 IBLA 171, 178 (1984), is set forth in toto:

> In Coastal States Energy Co., [70 IBLA 386, 395 (1983)], the Board rejected appellant's contention that this provision imposed liability without fault because BLM's response expressly disclaimed this was the intention of the language. However, the Board cannot ignore the obvious dichotomy between BLM's declared intention and the specific language used. Since this case is being remanded for other adjustments, the Board finds it appropriate to require BLM to revise section 26 to comport with the intention stated.

A similar revision is appropriate in the instant case and, accordingly, BLM's decision is set aside in this single respect.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office is affirmed in part, set aside in part, and remanded.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge.